92-1694

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1992

JEROME SUMLIN

Petitioner

VERSUS

SEAHAWK MANAGEMENT INCORPORATED

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether a seaman and ward of the admiralty may suffer dismissal of his case because of dilatory actions of his counsel of which he was completely unaware.

2. Whether a district court may legitimately consider counsel's misconduct in unrelated cases in punishing his client with dismissal of his case.

PARTIES

Plaintiff-Petitioner
Jerome Sumlin

Defendants-Respondents
Seahawk Management Inc.

These are the only parties to this litigation.

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RULE

Federal Rule of Civil Procedure 41 section (b) 1

OPINIONS BELOW

The opinions and judgments of the United States District Court for the Southern District of Alabama (Southern Division), dismissing the case and denying post-judgment relief, are reproduced in the Appendix. The summary affirmance of the United States Court of Appeals for the Eleventh Circuit was not published and is reproduced in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on 17 December 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Rule 41(b) provides:

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

The "sanction of last resort,"[1] "the blunderbuss of dismissal,"[2] has stripped a guiltless seaman-litigant, completely ignorant of the gross neglect of his counsel, of a right to seek compensation for his serious injuries.

This action is a seaman's suit for damages under the Jones Act, 46 U.S.C. § 688 et seq; federal jurisdiction is conferred by 28 U.S.C. § 1333. The plaintiff-petitioner, Mr. Jerome Sumlin, had his case dismissed before trial because of his first counsel's (Thomas J. Glidewell) dilatory conduct in pre-trial and discovery proceedings. The Magistrate of the District Court[3] referred to Federal Rule of Civil Procedure 41(b) and the Court's inherent power to impose sanctions as authority to dismiss the action.

Approximately sixteen months elapsed between the filing of Mr. Sumlin's Jones Act suit in December 1989 and its dismissal in April 1991.[4] The primary grounds for the dismissal, according to the Memorandum Opinion of the Magistrate (reproduced in the Appendix) were 1) tardy and unresponsive answers to interrogatories of defendant Seahawk Management Inc., and 2) failure to submit and update a timely pre-trial order. The defendant sent interrogatories on 23 August 1990. On 13 December 1990, in response to an order issued by the trial

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1. *Grochal v. Aeration Processes Inc.*, 797 F.2d 1093, 1099 (D.C. Cir. 1986)

2. *Comuni-Centre Broadcasting, Inc. v. Federal Communications Commission*, 856 F.2d 1551, 1552 (D.C. Cir. 1988) *cert den* 489 U.S. 1083 (1989).

3. William E. Cassady, Magistrate Judge of the United States District Court for the Southern District of Alabama, Southern Division.

4. The Appendix contains a more detailed time table of events from plaintiff's injury to the dates of the denials of plaintiff's motions for post judgment relief. Page A-22

judge[5] at a pre-trial conference two days earlier to answer the interrogatories, Mr. Glidewell provided answers which were incomplete. This prompted a motion to compel by the defendant filed on 2 January 1991. After no response by Mr. Glidewell for over one month, the District Judge endorsed this defense motion "Granted," though this fact was not made known to either party.

On 15 March 1991, eleven days before the scheduled trial date of 26 March, Mr. Glidewell sent unsigned supplementary responses to the interrogatories. Four days before the trial date, on 22 March 1991, Mr. Glidewell filed a motion to amend the pre-trial order to add three triable issues, four expert witnesses and six categories of documentary evidence.

In response to a defense motion the day before the trial, the Magistrate dismissed the case on 25 April 1991. Mr. Sumlin was notified of this dismissal on 7 May 1991; this was his *first* notice of dilatory behavior by his counsel. He immediately retained new counsel who promptly filed post judgment relief motions on 9 May and then on 30 July. These motions were denied.

The United States Court of Appeals for the Eleventh Circuit affirmed the dismissal in an unpublished summary opinion dated 17 December 1992.

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5. W. B. Hand, Senior United States District Judge for the Southern District of Alabama.

ARGUMENT

I. Plaintiff, A Seaman and Ward of the Admiralty Who Had No Notice of His Counsel's Dilatory Actions, Should Not Be Punished for His Counsel's Mistakes

Mr. Sumlin first discovered that his counsel was not meeting discovery deadlines or complying with pre-trial order requirements on 7 May 1991, twelve days after his Jones Act case was dismissed with prejudice. He had no idea his counsel was performing less than adequately, and the Magistrate made no finding that he was aware of his counsel's dilatory behavior.

This Court's pronouncements afford a seaman shelter from the consequences of his own ignorance. Mr. Sumlin, an injured seaman, should not have to pay the ultimate price of a dismissal of his case when he had no knowledge or warning that his counsel's actions were endangering his right to a judicial remedy for compensation for his serious injuries.

The trial court found support for his decision to punish Mr. Sumlin for his ignorance of Mr. Glidewell's actions in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). *Link* indeed held that because a plaintiff voluntarily selects his attorney as his representative in the action, he is bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." *Link*, 370 U.S. at 634, 82 S.Ct. at 1390.

Link and its progeny, however, cannot be applied to a seaman seeking redress in an admiralty court for his injuries.[6] "The

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6. *Link* suggests that a client deprived of his claim because of his attorney's incompetence has a remedy against his attorney in a suit for malpractice. *Link*, 370 U.S. at 634, n. 10, 82 S.Ct. at 1390, n. 10. The uninsured Mr. Glidewell is much more likely to be able to pay Seahawk's costs imposed in a sanctions order than he will ever be to satisfy a malpractice judgment in favor of Mr. Sumlin.

(continued...)

maritime law by inveterate tradition has made the ordinary seaman a member of a favored class. He is . . . often ignorant and helpless, and so in need of protection against himself as well as others." *Isbrandtsen Company Inc. v. Johnson*, 343 U.S. 779, 782, 72 S.Ct 1011, 1014, 96 L.Ed. 1294 (1952). Seamen are wards of the admiralty, *Garrett v. Moore-McCormack Company*, 317 U.S. 239, 246-47, 63 S.Ct. 246, 251, 87 L.Ed. 239 (1942), and this ancient characterization is even more accurate now than it was formerly. *Isbrandtsen Company Inc.*, 343 U.S. at 783, 72 S.Ct at 1014.

In fact, the defendant who sets up a signed release in defense of a suit for damages by a seaman must affirmatively show that no advantage has been taken and that the seaman fully comprehended the compromise. *Garrett*, 317 U.S. at 247-48, 63 S.Ct at 252.

> "The burden is on one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of his consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding."

Garrett, 317 U.S. at 246, 63 S.Ct at 251.

Admiralty courts provide special protection for seaman owing to such factors as their "alleged propensity toward rashness and credulity," "their nomadic nature and the perils they encounter at

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6.(...continued)

> "A suit for malpractice is a highly unsatisfactory remedy. In *Link* the Court found the imposition of [dismissal] appropriate to further the goals of relieving calendar congestion and preventing undue delay. . . . The possibility of a malpractice action frustrates both those goals."

Herring v. City of Whitehall, 804 F.2d 464, 467, n. 3 (8th Cir. 1986).

sea," and "the particularly authoritarian relationship of shipowners and their representatives to seamen and the isolation of the latter from the legal, economic and psychological support of a landbased community." *Lampsis Navigation Ltd. v. Ortiz de Cortez*, 694 F.2d 934, 936 (2nd Cir. 1982). If the admiralty courts scrutinize contracts signed by seaman with such suspicion, the same courts cannot be permitted to punish a seaman who is completely ignorant of his counsel's dilatory actions with dismissal of his suit for damages. The District Court's action in this case is just not consonant with the solicitude the admiralty court is required to show the seaman seeking judicial redress for his injuries.

Decisions by the lower federal courts forcefully illustrate the care and concern accorded seamen who claim compensation for wrongs done them: *Davis v. American Commercial Lines*, 823 F.2d 1006, 1007 (6th Cir. 1987) (Possibility that defendant overreached to obtain plaintiff's signature on a release justified reversal of defense summary judgment.) *cert den* 484 U.S. 1067 (1988); *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 606 (5th Cir. 1986) (Any release or settlement involving a seaman's rights is subject to careful scrutiny); *Smith v. Atlas Off-Shore Boat Service*, 653 F.2d 1057, 1063 (5th Cir. 1981) (Judicial deference to seaman justifies recognizing a cause of action in admiralty for a discharge caused by his filing of a personal injury claim against the employer.) *on remand* 552 F.Supp. 128 (S.D. Miss. 1982); *Schlesinger v. Teitelbaum*, 475 F.2d 137 (3rd Cir. 1973) (A district court may establish a schedule of contingency fees for use in personal injury actions brought by seamen.) *cert den* 414 U.S. 1111 (1973); *Hall v. Diamond M. Company*, 635 F.Supp 362, 366 (E.D. La. 1986) (Seamen are wards of the admiralty and legal questions should normally be construed liberally in their favor.).

Courts in admiralty cases are concerned that the seaman have an understanding of his legal rights before he contracts with regard to them. *Garrett*, 317 U.S. at 247-48, 63 S.Ct at 252 (Adequacy of consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant); *Gauthier v. Continental Diving Services*, 831 F.2d 559

(5th Cir. 1987) (Defendant must bear burden of demonstrating that the seaman fully appreciated the consequences of the settlement.); *Bass v. Phoenix Seadrill/78, Ltd.* 749 F.2d 1154, 1160-61 (5th Cir. 1985) (Court's ultimate concern is whether a seaman relinquished his rights with an informed understanding of those rights and a full appreciation of the consequences when he executed the release; courts must be particularly vigilant to guard against overreaching.); *Parks v. Dowell Division of Dow Chemical Corporation*, 712 F.2d 154, 159-60 (5th Cir. 1983) (Refusing to enforce an indemnification clause in an employment contract when there was no evidence that the clause was fully explained to the seaman nor that he received additional compensation for the relinquishment of his rights as a seaman.); *Wink v. Rowan Drilling Company*, 611 F.2d 98, 100 (5th Cir. 1980) (Releases or settlements involving seaman's rights are subject to careful scrutiny; the burden is on the party claiming settlement to prove that it was entered into by the seaman with a full understanding of his rights.) *cert den* 449 U.S. 823 (1980); *Aguiluz-Nunez v. Carnival Cruise Lines, Inc.* 584 F.2d 76, 78 (5th Cir. 1978) (Defense summary judgment reversed; genuine issue of fact whether seaman executed release with full comprehension where he stated that the significance of the release was not explained to him, and *his legal rights were not discussed.*); *Lewis v. Texaco Inc.*, 527 F.2d 921, 924-25 (5th Cir. 1975) (Wage claim was not barred by releases in foreign articles signed by seamen plaintiffs; plaintiffs were not represented by counsel and were not made aware of their statutory rights.).

The District Court has subjected Mr. Sumlin to a drastic foreclosure of his legal right to seek compensation with nowhere near the same concern with which it is required to view a release signed by Mr. Sumlin. Mr. Sumlin, finally, with a full understanding of what his counsel had done to him, promptly retained another attorney who within two days filed a post-judgment relief motion.[7]

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7. Mr. Sumlin also signed a detailed four page affidavit on 14 May 1991 explaining how he is disabled as a seaman, his belief that the (continued...)

Notice that his rights were slipping away was all that he needed. He was unjustly denied that notice before his case was dismissed.

A rule that requires a district court to ensure that a seaman litigant has notice of his counsel's indifference to his rights would in fact be consonant with the thinking of many federal courts in non-seaman dismissal cases. Despite the command of *Link* that the client must suffer for the sins of his chosen counsel, courts have been extremely reluctant to punish a litigant with a dismissal with prejudice where the client was not only blameless but ignorant of his attorney's misconduct.

Cogent and compelling analysis was offered by the court in *Jackson v. The Washington Monthly Co.*, 569 F.2d 119 (D.C. Cir. 1977):

> When a client does not knowingly and freely acquiesce in his attorney's neglectful conduct, but instead is misled into believing that the attorney is industrious, dismissal is not only a harsh step but one for which the circumstances provide little support for an agency theory as a rationale.[8]

Jackson, 569 F.2d at 122, n. 18.

> Trial court dismissal of a lawsuit never heard on its merits is a drastic step, normally to be taken only after unfruitful resort to lesser sanctions And while appellate review is limited by the binding authority of *Link* to whether judicial discretion has been abused, a sound

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7.(...continued)
case was being prosecuted in a timely way until he received notice of its dismissal, how he promptly discharged Mr. Glidewell and retained new counsel, and asking the court to reinstate his action.

8. Mr. Sumlin was completely ignorant of Mr. Glidewell's misbehavior. See footnote 7.

> discretion hardly comprehends a pointless exaction of retribution. Dismissals for misconduct attributable to lawyers and in no wise to their clients invariably penalize the innocent and may let the guilty off scot-free. That curious treatment strikes us as both anomalous and self-defeating. When the client has not personally misbehaved and his opponent in the litigation has not been harmed, the interests of justice are better served by an exercise of discretion in favor of appropriate action against the lawyer as the medium for vindication of the judicial process and protection of the citizenry from future imposition. Public confidence in the legal system is not enhanced when one component punishes blameless litigants for the misdoings of another component of the system; to laymen unfamiliar with the fundamentals of agency law, that can only convey the erroneous impression that lawyers protect other lawyers at the expense of everyone else.

(footnotes omitted) *Jackson*, 569 F.2d at 123-24.

In fact the District of Columbia Circuit subsequently fashioned a rule apparently requiring the notice to the client Mr. Sumlin believes is due every seaman:

> We look disfavorably upon dismissals as sanctions for attorney misconduct or delay *unless the client himself has been made aware of the problem, usually through notice from the trial court*. We advise strongly that district courts themselves directly notify the *client* when attorney misconduct has occurred that the court is contemplating dismissal if a recurrence occurs. That communication should notify the client, in clear and unequivocal terms, that his case is in danger of dismissal due to his lawyer's dereliction; . . .

Shea v. Donohoe Construction Co. Inc. 795 F.2d 1071, 1078 (D.C. Cir. 1986).

The unfairness of a dismissal imposed without directly warning the client has been noted by other courts. *Lowe v. City of East Chicago, Indiana*, 897 F.2d 272, 274 (7th Cir. 1990) ("We are reluctant to affirm a dismissal when there is no sign of either client neglect or court processes or knowledge of the attorney's neglect."); *Carter By And Through Carter v. United States*, 780 F.2d 925 (11th Cir. 1985) (Reversing a denial of a Rule 60(b) reinstatement motion—this was the lawyer's first federal case; there had been no warning to his clients of dismissal possibility; other logistical problems of the plaintiffs cited); *West Coast Theater Corporation v. City of Portland*, 897 F.2d 1519, 1523 (9th Cir. 1990) (Appellate court review of a *sua sponte* dismissal will include the inquiry of whether the district court warned the plaintiff that dismissal was imminent, so limited by *Morris v. Morgan Stanley & Company*, 942 F.2d 648, 650-52 (9th Cir. 1991)). *See*, *Aucoin v. K-Mart Apparel Fashion Corp.*, 943 F.2d 6 (5th Cir. 1991) (In affirming dismissal, court found significant that the district court mailed a notice to the plaintiff personally warning her that failure to appear for a pre-trial conference might result in dismissal.)

Many courts, obviously chafing under the harsh rule of *Link*, have explicitly considered client culpability in reviewing a 41(b) dismissal. *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992) (In addition to two "requisite factors" needed to affirm dismissal, this court looks for one of three "aggravating factors", including plaintiff-caused delay); *Buck v. U.S. Dept. of Agriculture Farmer's Home Administration*, 960 F.2d 603, 608 (6th Cir. 1992) (Despite the Supreme Court's unequivocal language this Court has been extremely reluctant to uphold the dismissal of a case merely to discipline an errant attorney); *Doyle v. Murray*, 938 F.2d 33, 34-35 (4th Cir. 1991); *Lowe*, *supra*; *John v. State of Louisiana*, 828 F.2d 1129, 1132 (5th Cir. 1987) (The proper punishment for an inept lawyer is to assess fines, attorney fees, or costs against the lawyer without harming the client) *after remand* 899 F.2d 1441 (5th Cir. 1990); *Grochal v. Aeration Processes Inc.*, 797 F.2d 1093, 1099 (D.C. Cir. 1986) ("It is also significant that the facts of this case provide no basis for imputing the conduct of I.W.'s

lawyers . . . to I.W."; reversing dismissal); *Ford v. Fogarty Van Lines Inc.*, 780 F.2d 1582, 1583 (11th Cir. 1986); *Bluitt v. Arco Chemical Company*, 777 F.2d 188, 190-91 (5th Cir. 1985) (Dismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client; affirming dismissal on a finding of bad faith on the part of the plaintiff himself.); *Goforth v. Owens*, 766 F.2d 1533 (11th Cir. 1985) (Affirming Rule 41(b) dismissal because of alleged extreme prejudice to defendant doctors who had canceled appointments, but stating that a court should be extremely reluctant to affirm a dismissal where the plaintiff is not actually culpable.)[9]; *Matter of Sanction of Baker*, 744 F.2d 1438, 1442 (10th Cir. 1984) (en banc) (If the fault lies with the attorneys, that is where the impact of sanction should be lodged. If the fault lies with the clients, that is where the impact should be lodged.) *cert den* 471 U.S. 1014 (1985); *Moore v. St. Louis Music Supply Company Inc.*, 539 F.2d 1191, 1194 (8th Cir. 1976) (It does not follow that the "client should be the one to feel the lash" of punishment for attorney misconduct); *Flaksa v. Little River Marine Construction Co. Inc.*, 389 F.2d 885 (5th Cir. 1968) *cert den* 392 U.S. 928 (1987). *See*, *Hillig v. Commissioner of Internal Revenue*, 916 F.2d 171 (4th Cir. 1990); *McCargo v. Hendrick*, 545 F.2d 393 (4th Cir. 1977); *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974).

Mr. Sumlin asks this Court to grant this Petition for Certiorari to announce a rule that a federal district court directly notify a seaman that his suit is in danger of being dismissed due to his lawyer's dilatory or other misconduct. Such a rule is consonant with and justified by the deference due the seaman as a ward of the admiralty. A seaman, viewed by the Admiralty as an unsophisticated litigant, is owed no less.

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9. The defendant in the present case, Seahawk Management Inc., would have suffered no prejudice if the trial court had merely continued the trial date so Mr. Sumlin's second counsel could prepare, and ordered Mr. Glidewell to pay Seahawk's costs in getting its discovery responses.

II. Plaintiff's Counsel's Actions in Unrelated Cases Are An Illegitimate Consideration for a Sanctions Decision

In last paragraph of the Magistrate's Memorandum Opinion, just before the Conclusion, (page 12, A-15), he stated:

> Mr. Glidewell's conduct during the pretrial proceedings in *other cases* involving similar claims is considered a *significant factor* in the decision as to which sanction is appropriate. *See, Prince v. Poulos*, 876 F.2d 30 (5th Cir. 1989). The inescapable conclusion must be that the actions of Mr. Glidewell in the three cases noted herein constitute a policy or the emergence of a pattern of practice to wilfully disregard the rules and orders of this Court. In order to deter such conduct, the sanction of dismissal with prejudice is required.

[Emphasis added][10].

Whatever merit on deterrence grounds there may be in punishing the litigant because of the sins of his attorney, the client is no way responsible or accountable for his attorney's actions in other cases and cannot be made to suffer the ultimate sanction of dismissal for them. *See, Doyle v. Murray*, 938 F.2d 33, 34-35 (4th Cir. 1991); *Rogers v. Kroger Company*, 669 F.2d 317, 322 (5th Cir. 1982).

Other sanctions readily available to the district court can be used to impress the attorney with the importance of obeying court orders and complying with deadlines. The court in *Shea v. Donohoe Construction Co. Inc.*, 795 F.2d 1071, 1078 (D.C. Cir. 1986) suggested: warning, formal reprimand, placing the case at

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10. *Prince v. Poulos* does not at all support the idea that a client should be punished for his attorney's actions in unrelated cases. In fact the *Prince* court noted in affirming a dismissal that the client was not blameless, but was an attorney with direct involvement in the dilatory and obstructionist tactics underlying the dismissal. There was no mention at all of counsel's behavior in other cases before the district court.

the bottom of the calendar list, a fine, the imposition of costs or attorney fees, temporary suspension of counsel from practice before the court, dismissal of the suit unless new counsel is secured, and communication of the lawyer's actions to the client or bar association; *see also, Dennis v. A. H. Robins Co. Inc.*, 860 F.2d 871, 872 (8th Cir. 1988) (suggesting monetary or practice sanctions for counsel's consistent failure to follow the court's orders, and reversing the dismissal).

The notion that the client should have to pay the price of the entire loss of his rights because of the sins of the attorney in not only his but other actions over which he has no control is simply unsupportable.

CONCLUSION

Jerome Sumlin asks this Court to grant this Petition for Certiorari and to announce a rule that a district court must satisfy itself that a seaman plaintiff is at least aware of his counsel's dilatory actions before imposing the most severe sanction of dismissal. This Court should also make it crystal clear that a district court is not permitted to consider an attorney's misbehavior in unrelated actions before the court to punish that attorney's client with dismissal of his case.

Respectfully submitted,

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APPENDIX

OPINIONS AND JUDGMENTS BELOW

I. Judgment of Dismissal in the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JEROME SUMLIN, :

Plaintiff, :

vs. : CA 89-0936-MC[1]

SEAHAWK MANAGEMENT, INC.

Defendant. :

JUDGMENT

It is ORDERED, ADJUDGED and DECREED that this cause of action be DISMISSED WITH PREJUDICE as a sanction for plaintiff's willful disregard of the Rules and Orders of this Court.[2] This sanction is imposed on the authority of Rule 41(b) and the Court's inherent power to impose sanctions.

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1. On March 25, 1991, the parties consented to have the undersigned conduct all further proceedings in this case pursuant to 28 U.S.C. S 636(c) and Local Rule 26, Sec. 1(h).

2. Plaintiff cannot avoid the consequences of the acts or omissions of his freely-selected agent. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962).

DONE this 25th day of April, 1991.

_____

WILLIAM E. CASSADY
UNITED STATES MAGISTRATE JUDGE

II. Opinion of District Court Supporting Dismissal

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JEROME SUMLIN, :

Plaintiff, :

vs. : CA 89-0936-MC[1]

SEAHAWK MANAGEMENT, INC.

Defendant. :

MEMORANDUM OPINION

During a pretrial conference conducted on March 25, 1991,[2] defendant Seahawk Management, Inc. moved to dismiss plaintiff's cause of action due to an abuse of the pretrial process which included his disregard of Court orders. The defendant was directed to reduce its motion to writing and the written motion was filed on March 29, 1991. Plaintiff filed his response to the motion to dismiss on April 8, 1991. After careful consideration of the entire file, as well as the arguments presented during the pretrial conference of March 25, 1991, it is the undersigned's opinion that dismissal of plaintiff's cause of action is appropriate given the particular facts of this case.

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1 On March 25, 1991, the parties consented to have the undersigned conduct all further proceedings in this case pursuant to 28 U.S.C. Subsection 636(c) and Local Rule 26, Sec. 1(h).

2. The trial was set for March 26, 1991. The jury was selected on February 25, 1991.

FACTS AND PROCEDURAL HISTORY

Plaintiff filed his complaint on December 4, 1989, alleging that his employer had been negligent in the operation of the M/V FALCON CHAMPION. He sought damages (both compensatory and punitive) for simple negligence, gross negligence, and defendant's failure to pay maintenance and cure. Defendant's answer was filed on February 15, 1990.

A Rule 16 discovery and scheduling order was entered on March 22, 1990, which established the discovery cutoff date as September 24, 1990. At plaintiff's request, Judge Hand[3] extended discovery for sixty days establishing a new cutoff date of November 26, 1990.

Nineteen days before the end of discovery (November 7, 1990), defendant filed a motion to compel the plaintiff to answer interrogatories which had been propounded on or about August 23, 1990. (Motion to Dismiss, Exhibit 2). Plaintiff neither responded to the motion to compel nor served his responses to the interrogatories prior to the close of discovery. Therefore, at the time Judge Hand conducted a final pretrial conference on December 11, 1990, plaintiff's responses to the interrogatories were approximately seventy-five days late (September 26 - December 11). Plaintiff was ordered by Judge Hand to answer the interrogatories no later than December 14, 1990.[4]

Plaintiff served answers to the August 1990 interrogatories on or about December 13, 1990. Defendant determined that a number of the answers were incomplete, evasive or otherwise nonresponsive so, a motion for sanctions pursuant to Rule 37(b)(2) was filed on January 2, 1991. (Motion to Dismiss, Exhibit 5).

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3. Senior United States District Judge W. B. Hand was the trial judge prior to referral to the undersigned on consent of the parties.

4. This order was not reduced to writing but the parties agree that Judge Hand issued an oral order during the December 11, 1990 pretrial conference.

Plaintiff failed to respond to the motion for sanctions and on February 7, 1991, the motion was endorsed "Granted" by Judge Hand.[5] The granting of the motion by Judge Hand effectively prohibited plaintiff from introducing evidence or to otherwise establish facts that were the subject of those interrogatories not answered by the plaintiff. His order precluded testimony or evidence of (1) negligent or careless acts by servants, agents or employees of the defendant; (2) improper, inadequate, unsafe or defective equipment; and (3) opinions held by expert witnesses. It is clear that if this order were enforced at trial, plaintiff could not prove a prima facie case on any issue identified in the pretrial document, thus, the ruling by Judge Hand constitutes (in reality) a dismissal of plaintiff's cause of action.[6]

On February 19, 1991, plaintiff filed a motion to amend the witness list contained in the pretrial order. He was very vague as to why he wanted to add witnesses and certainly made no showing as to why the witnesses were unknown at the pretrial conference or shortly thereafter. Plaintiff had not supplemented his interrogatory answers to identify these witnesses or the substance of their testimony. The defendant did not know their identity until February 19, 1991 and was not given a summary of their expected testimony until the pretrial conference held on March 25, 1991.

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5. The Clerk's office failed to notify the parties of Judge Hand's ruling so, it was not until the pretrial hearing conducted on March 25, 1991, that either party had notice of said ruling.

6. The interrogatories not answered (25, 27, 28, 29, 31, 32, 33, 34, 35, 36 and 37) pertained to core discovery issues: (1) each and every alleged negligent act; (2) the alleged defectiveness or dangerous condition of the gangway; (3) eyewitnesses to the accident and their statements, if any; (4) names of persons previously injured for similar reasons; (5) photographs of the accident scene; and (6) identification of witnesses (including experts) and a statement as to the subject matter of their testimony and facts upon which their testimony would be based.

A jury was selected in this case on February 25, 1991, and the trial scheduled for March 26, 1991. Plaintiff, on March 22, 1991, twenty-five days after the jury was selected and just four days prior to trial, moved to amend the pretrial order to add three triable issues, four expert witnesses and six categories of documentary evidence. Prior to filing the meadow to amend the pretrial document, plaintiff's attorney signed a pleading entitled "Supplemental Responses to Defendant's Interrogatories." The "Supplemental Responses" were not made under oath. (Motion to Dismiss, Exhibit 6). Defendant moved to strike the supplemental responses, certainly an appropriate motion given the fact that the supplemental responses were not signed under oath by the person to whom the interrogatories were propounded.

DISCUSSION

A. Authority to Impose Sanctions. This Court "possesses the inherent power to police its docket." *Mingo v. Sugar Cane Growers Co-op of Florida*, 864 F.2d 101, 102 (11th Cir. 1989) (citing *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-30, 82 S.Ct. 1386, 1388, 8 L.Ed.2d 734 (1962)). "Incident to this power, the judge may impose formal sanctions upon dilatory litigants. The sanctions imposed can range from a simple reprimand to an order dismissing the action with or without prejudice." *Id.*

When dismissal of a plaintiff's cause of action is requested, as in the present case, the record must reveal a "clear record of delay nor willful contempt *and* a finding that lesser sanctions would not suffice." *Id. quoting Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985))(emphasis in original). "Dismissal of a case with prejudice is considered a sanction of last resort, applicable only in extreme circumstances." *Id.*[7]

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7. Plaintiff argues in his April 8, 1991 brief filed in response to the motion for sanctions that Rule 41 is not to be relied upon by the Court when deciding the present issue. He states that "the sanctions (continued...)

B. Record of Delay or Willful Contempt.

1. Delay. Defendant propounded interrogatories on the plaintiff in August, 1990, which requested relevant information going directly to the foundation of plaintiff's claims. This request was made a full eight months after the action was filed and within the original discovery period established by the Court on March 22, 1990. Plaintiff neither responded to these interrogatories within thirty days as required by Rule 33(a) nor did he seek an extension of time to make a response.[8]

Defendant's informal requests for resolution of this discovery problem went unanswered thus necessitating a formal motion to compel that was filed on November 7, 1990. Plaintiff never responded to the motion to compel. On December 11, 1990, Judge Hand ordered that he answer the interrogatories within three days. Plaintiff served his answers on December 13, 1990, but as to interrogatories 25 (each negligent act), 28 (witnesses to the

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7.(...continued)
in Rule 37(b) govern exclusively" and cites *Societe Internationale Poar Participations Industrielles of Commercides, S.A. v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). This argument is rejected. The undersigned is not merely basing this decision on one isolated failure to obey a discovery order, but on plaintiff's "continuing pattern of delay, noncooperation and disobedience." *Roland v. Salem Contract Carriers, Inc.*, 811 F.2d 1175, 1179 n. 4 (7th Cir. 1987).

8. It is doubtful that an extension would have been granted given the nature of the interrogatories. They were clearly designed to elicit information available to the plaintiff and his attorney prior to the filing of a complaint. By signing the complaint, plaintiff's attorney had certified that the factual allegations were "well grounded" after a "reasonable inquiry" had been made. Rule 11, Fed.R.Civ.P. Accordingly, after such a reasonable inquiry and eight months for discovery, the time was ripe for the defendant to receive answers to questions regarding specific allegations of negligence and identification of trial witnesses (including experts).

accident), 29 (persons having taken statements), 32 (photographs of accident scene), 33 (documentary evidence of accident), 36 (list of expert witnesses to be called at trial), and 37 (all other witnesses to be called at trial), his answer was simply "[w]ill supplement." This was two days after the final pretrial conference!

Plaintiff attempted to supplement his December 13th answers on March 15, 1991. The supplemental answers fail to comport with the Federal Rules of Civil Procedure for at least two reasons: (1) they were not signed under oath by the party to whom they were directed, Rule 33(a); *see also*, *Cabales v. U.S.*, 51 F.R.D. 498 (S.D. N.Y. 1970) (unsigned and unverified writing purporting to be responding party's answers do not qualify as an answer to interrogatories), *aff'd*, 447 F.2d 1358 (2nd Cir. 1971); and (1) the purported supplemental answers as to expert witnesses were not made seasonably as is required by Rule 26(e).

> Rule 26(e)(1) of the Federal Rules of Civil Procedure is also pertinent. So far as applicable here, that rule imposes a duty to supplement responses for discovery addressed to "the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony." This duty is directed to be discharge "seasonably". In the absence of unexpected developments, supplementation after the jury has been drawn cannot be considered to have been made "seasonably". The subjective explanation for the default is irrelevant. It makes no difference whether it was due to failure to prepare for trial or to an intentional purpose to gain the benefit of surprise. The rule bars the result without regard to cause, except for those beyond control.

Tabatchnick v. G. D. Searle & Co., 67 F.R.D. 49, 55 (D. N.J. 1975). Accordingly, on the day before trial, with a jury selected, plaintiff had never answered core interrogatories posed by the defendant in August 1990 and ordered answered by Judge Hand on December 11, 1990.

Subsequent to defendant's motion to compel answers to interrogatories, but prior to the final pretrial conference conducted by Judge Hand on December 11, 1990, plaintiff's counsel was engaged in the preparation of a proposed pretrial order as was required by Judge Hand's standing pretrial scheduling order. The pertinent portions of the standing scheduling order are as follows:

> It is ORDERED that the following special requirements shall prevail for Pretrial in Judge W. B. Hand's Court:
>
> 1. Counsel shall confer and prepare a single proposed Pretrial Order in the form attached, which must be in the Court's hands at least one full week before the pretrial hearing.
>
> . . .
>
> 4. The proposed Pretrial Order shall contain:
>
> . . .
>
> B. A written statement of contested issues that will explain to the Court and/or jury the parties' disputes, . . .
>
> C. The triable issue or issues.
>
> . . .
>
> F. A list and description of any law or motion matters pending or contemplated.
>
> . . .
>
> H. Counsel shall list the names and addresses of all witnesses which shall or may be called and, as to experts, a narrative statement of his or her qualifications in sufficient form to be read to the jury by the party offering such witnesses. Any objections to the experts

shall be separately set forth and the issue shall be decided at the Conference.

. . .

J. Each party shall list all exhibits which are to be admitted. All exhibits to which there is no objection shall be so designated. All exhibits to which there are objections, shall be noted and by whom the objection is made, setting forth the nature of the objection, and the authority supporting same. Failure to comply shall constitute a waiver of any such objection.

K. Except for good cause shown, the Court will not permit the introduction of any exhibits unless they have been listed in the Pretrial Order, with the exception of exhibits to be used solely for the purpose of impeachment.

. . .

Failure to strictly comply with this Order in the form and under the terms contained herein, unless previously excused, shall result in the offending party being found in civil contempt, and such civil contempt shall continue from day to day until compliance with the Order. Failure to comply within a period of five (5) days thereafter, and explanation satisfactory to the Court not having been given and accepted, shall result in the cause being dismissed or default judgment being entered whichever is appropriate. (Emphasis in original).

Judge Hand's scheduling order is obviously designed to facilitate a discussion of the subjects listed in Rule 16(c). It contained a warning that a failure to strictly comply with the order could result in a dismissal of plaintiff's action as set forth in Rule 16(f) which plainly states that:

> If a party or party's attorney fails to obey a scheduling pretrial order, . . . or . . . is substantially unprepared to participate in the conference, . . . the judge, upon motion or the judge's own initiative may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D).

During the Rule 16 conference held on December 11, 1991, Judge Hand found defendant's motion to compel valid and ordered compliance within three days. The record contains no notice to the Court that plaintiff could not meet the three-day limitation nor was a request for an extension granted. The record does disclose a failure by plaintiff to comply with Rule 16 (he was not substantially prepared to participate in a final pretrial conference), Rules 26(e) and 33 (he never filed answers to the August 1990 interrogatories) and a violation of Judge Hand's scheduling pretrial order (experts were not listed nor a summary of their qualifications given, all triable issues were not stated, and all exhibits were not produced for defendant's inspection). The failures identified have caused counsel for the defendants to engage in additional work, precipitated additional hearings prior to trial, worked a continuance of the trial and a declaration of a mistrial by the Court (jury was discharged) thus depriving the defendant of a jury of choice. The prejudice to the defendant is therefore largely incalculable rendering all sanctions, other than dismissal with prejudice, incapable of meeting the twin goals of a just, speedy, and inexpensive determination of every action and to deter future abuse of the pretrial preparation process.

2. Wilful Contempt. The actions by the plaintiff previously outlined herein constitute willful disregard of the Federal Rules of Civil Procedure and the Orders of this Court. Both the letter and the spirit of Rules 16, 26 and 33 have been violated. Even after plaintiff was ordered to answer the defendant's interrogatories[9] by

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9. The answering of the interrogatories would have also cured the deficiencies in the proposed pretrial order. Judge Hand's December (continued...)

Judge Hand, plaintiff had not done so by March 25, 1991. No attempt was made to be substantially prepared to engage in a final pretrial conference. Critical changes[10] to the pretrial document were requested not only after the pretrial conference held December 11, 1990, but after the jury was selected on February 25, 1991. The granting of the relief requested by the plaintiff would have worked a continuance of the trial without the slightest showing that he had good cause for seeking a delay.

The following are specific instances that support a finding that plaintiff's counsel has willfully disregarded the rules and orders of this Court:

(a) He failed to respond to interrogatories within thirty days after receipt and without any excuse;

(b) He failed to seek an extension of time to respond to defendant's interrogatories;

(c) He failed to reach an accord with defense counsel informally on the outstanding interrogatory answers, thereby forcing a motion to compel;

(d) He did not respond in any manner to the motion to compel, resulting in Judge Hand's oral order that he have his client answer the outstanding interrogatories within three days of the final pretrial conference;

(e) He attempted to comply with Judge Hand's order by filing evasive, incomplete and nonresponsive answers to core discovery issues without an adequate explanation;

9.(...continued)
11th order certainly constituted an attempt by the Court to enforce its rules and orders without resorting to harsh sanctions. The attempt failed, even though it should have been obvious that dismissal was a real possibility if the information defendant sought was not forthcoming.

10. Plaintiff sought to add triable issues obviously known at the time the complaint was filed, experts either known at the time of the pretrial conference or retained (vocational expert) after jury selection, and exhibits either possessed at the time of the pretrial conference or produced after jury selection.

(f) When defendant moved for sanctions against the plaintiff on January 2, 1991, plaintiff never responded to this motion. It remained pending before the Court for more than thirty days and then was granted in its entirety by Judge Hand on February 7, 1991. The sanctions requested by defendant and granted by Judge Hand, after waiting thirty days for plaintiff's explanation, effectively destroy plaintiff's ability to previously stated, would deny plaintiff the opportunity to present evidence central to his claims;

[On 2 August 1991, Magistrate Cassady entered an order, on authority of F.R.C.P. 60(a), deleting the third sentence in paragraph (f) and substituting therefor:

The sanctions requested by defendant and granted by Judge Hand, after waiting thirty days for plaintiff's explanation, effectively destroy plaintiff's ability to present evidence central to this claims;]

(g) He participated in a final pretrial conference on December 11, 1991, without being fully prepared. Then, on March 22, 1991, sought to amend the pretrial order to add triable issues, expert witnesses and exhibits. Even in his amendment, he had not complied with Judge Hand's pretrial scheduling order that required him to list his expert witnesses and give a brief narrative of their qualifications;

(h) His attempt to supplement and give information requested in August 1990 on March 15, 1991, was procedurally deficient and thus is deemed no response at all; and

(i) He never provided the defendant with core discovery needed to adequately prepare for trial in this cause even after Judge Hand had ordered on December 11, 1990 that he do so.

The actions of Mr. Glidewell on behalf of his client in failing to complete discovery, properly engage in a substantive pretrial conference and to properly prepare for trial constitute a willful contempt for the rules and orders of this Court.

B. Dismissal With Prejudice as an Appropriate Sanction. The undersigned has considered the wide range of available sanctions, but considers dismissal with prejudice as the only viable sanction that meets the objectives of preventing unfair prejudice to the defendant and protecting the integrity of this court. The specific facts that have been considered in reaching this conclusion are:

(1) The undersigned is unsure that a delay in the trial, coupled with requirements that plaintiff comply with all previous orders and pay attorney's fees and costs incurred by the defendant that have been caused by plaintiff's past transgressions would cure all prejudice to the defendant;

(2) Plaintiff's counsel has offered no circumstances beyond his control that caused him not to complete discovery and adequately prepare for a pretrial conference as ordered by the Court. In order to maintain consistency and respect for the scheduling orders, the officers of this Court must actively enforce their orders. In the present case, not only have the violations been egregious, but no attempt to correct the problem was made in a timely fashion. Furthermore, when compliance was ordered, plaintiff and his attorney failed to comply thereby prejudicing defendant's ability to proceed with the scheduled trial and disrupting the Court's trial schedule. Such conduct can only be prevented in future cases by imposing the most extreme sanction available.

(3) Mr. Glidewell's conduct during the pretrial stage of this case is not an isolated incident. He represents two other plaintiffs in admiralty cases pending in this Court where disregard of the rules of procedure has been observed. He failed to participate in a properly noticed deposition in *Cruz v. Seahawk Management*, Civil Action Number 89-0762-RV-C,[11] alleging that his client was at sea and therefore, unavailable. When the plaintiff's deposition

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11. A defense motion to dismiss on the basis of abuse of the pretrial process is presently pending in this case as well.

was ultimately taken, after the final pretrial conference had been held, it was discovered that his client was indeed available for deposition as was noticed. In *Tims v. United States of America, et al.*, Civil Action Number 90-0190-CB-C, his responses to interrogatories and a request for production contained objections that had long since been waived and were interposed even though the Court had entered an order compelling him, and his client, to do what the discovery rules required.[12]

Mr. Glidewell's conduct during the pretrial proceedings in other cases involving similar claims is considered a significant factor in the decision as to which sanction is appropriate. *See Prince v. Poulos*, 876 F.2d 30 (5th Cir. 1989). The inescapable conclusion must be that the actions of Mr. Glidewell in the three cases noted herein constitute a policy or the emergence of a pattern of practice to wilfully disregard the rules and orders of this Court. In order to deter such conduct, the sanction of dismissal with prejudice is required.[13]

CONCLUSION

Since it has been found that plaintiff and his attorney have, in bad faith, disregarded the Federal Rules of Civil Procedure and the Orders of this Court causing delay as well as prejudice to the defendant's ability to mount a defense, and further, that the extreme sanction of dismissal with prejudice is the appropriate sanction, the undersigned shall, by separate document, enter a judgment dismissing plaintiff's action with prejudice.

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12. A second defense motion to compel has now been filed in this action in an attempt to dislodge withheld information.

13. " 'Unless severe sanctions are imposed . . . the deterrent function of sanctions will not be achieved.' " *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1210 (11th Cir. 1985) (quoting Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Calif. L.Rev. 264, 643 (1979).

DONE this 25th day of April, 1991.

WILLIAM E. CASSADY
UNITED STATES MAGISTRATE JUDGE

III. Memorandum Opinion and Order Denying Post-Judgment Relief

Magistrate Cassady of the District Court denied the first post-judgment relief motion in a "Memorandum Opinion and Order," dated 15 July 1991:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JEROME SUMLIN, :

Plaintiff, :

vs. : CA 89-0936-MC[1]

SEAHAWK MANAGEMENT, INC.

Defendant. :

MEMORANDUM OPINION AND ORDER

Plaintiff, Jerome Sumlin, has moved, through new counsel, to have the judgment entered on May 1, 1991, vacated pursuant to Rule 59, Federal Rules of Civil Procedure, or in the alternative, has asked that the Court exercise its discretion and grant equitable relief pursuant to Rule 60(b), Federal Rules of Civil Procedure. After carefully reviewing plaintiff's motion and the response filed by the defendant on May 15, 1991, it is determined that both motions are due to be denied.

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1. On March 25, 1991, the parties consented to have the undersigned conduct all further proceedings in this case pursuant to 28 U.S.C. § 636(c) and Local Rule 26, Sec. 1(h).

Rule 59(e) has been interpreted to authorize a court to vacate its judgment when the Court is convinced that its previous judgment was based on an erroneous understanding of prior precedent. *See A.D. Weiss Lithograph v. Ill. Adhesive Products*, 705 F.2d 249, 250 (7th Cir. 1983) (*citing* 11 Wright & Miller, *Federal Practice and Procedure: Civil Section 2817*). Plaintiff seeks to have the judgment set aside on the theory that he is not responsible for the misdeeds of his attorney identified in the Court's Memorandum Opinion dated April 25, 1991. No argument is made that the described wrongful conduct did not occur but plaintiff asks that he not be held accountable for the uncontrolled failures of his former agent. Plaintiff has failed to cite any authority for the proposition that he should not be held accountable for the actions of his attorney which have been determined to prejudice defendant's position in this cause of action. The Supreme Court, on the other hand, has made it clear that litigants are bound by the acts as well as the errors of their chosen attorneys. *Irwin v. Veterans Administration*, 111 S.Ct. 453, 456, 112 L.Ed.2d 435 (1990); *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962); see also *Coleman v. Thompson*, 59 U.S.L.W. 4789, 4797 (June 24, 1991)(an "attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error' ") (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

Plaintiff has failed to show that the judgment sought to be set aside is the result of erroneous legal conclusions. Accordingly, plaintiff's motion for vacation of judgment pursuant to Rule 59(e), is DENIED.

The plaintiff also asks this Court to exercise its discretion and set aside the previous judgment on equitable grounds pursuant to Rule 60(b), Federal Rule of Civil Procedure. For those reasons stated in the opposition brief filed by the defendant on May 15, 1991, which are adopted as if set out herein, plaintiff's alternative motion is DENIED.

DONE this 15th day of July, 1991.

WILLIAM E. CASSADY
UNITED STATES MAGISTRATE JUDGE

IV. Denial of Second Post-Judgment Relief Motion

Magistrate Cassady of the District Court denied the second post-judgment relief motion with a notation on the last page of the motion:

"Denied. No new argument has been presented. 8/6/91"

/s/ William E. Cassady

V. Eleventh Circuit Summary Affirmance

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-7629

D.C. Docket Number 89-0936-MC

JEROME SUMLIN

Plaintiff-Appellant

versus

SEAHAWK MANAGEMENT, INC.,
TITAN NAVIGATION, INC., AND
M/V FALCON CHAMPION

Defendants-Appellees

Appeal from the United States District Court
For the Southern District of Alabama

(December 17, 1992)

Before HATCHETT, Circuit Judge, HENDERSON and ESCHBACH*, Senior Circuit Judges.

PER CURIAM

AFFIRMED. See Eleventh Circuit Rule 36-1.

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*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Time Table of Events Leading to Dismissal by District Court

Date	Event	Comment
3 October 1988	Plaintiff is injured boarding his ship when gangway catches his foot, crushing two toes and injuring knee.	
4 December 1989	Plaintiff's petition filed in court.	
15 February 1990	Defendant files answer.	
22 March 1990	Court enters Rule 16 discovery and scheduling order, establishing discovery cut off date of 24 September.	Glidewell subsequently receives a 60 day extension from the court.
23 August 1990	Defendant propounds interrogatories to Glidewell.	Glidewell does not respond within statutory period nor seek an extension of time within which to respond.
7 November 1990	Defendant files motion to compel answers to interrogatories.	Glidewell does not respond.
26 November 1990	Second date for discovery cutoff, after 60 day extension requested by Glidewell and granted by Hand, J.	Glidewell has still not responded to defendant's interrogatories.
11 December 1990	"Final" pre-trial conference; Judge Hand orders Glidewell to respond to interrogatories in three days.	Glidewell is unprepared.

Date	Event	Comment
13 December 1990	Glidewell files incomplete, unresponsive and evasive answers to defendant's August interrogatories.	
2 January 1991	Defendant files Rule 37(b)(2) motion for sanctions.	Glidewell does not respond.
7 February 1991	Defendant's motion for sanctions is endorsed "Granted" by Judge Hand; fact of this endorsement was not made known to parties until 25 March, the day before trial.	Effect of this sanction would be to prohibit plaintiff from introducing evidence establishing facts which were the subject of the interrogatories. Plaintiff's case would be gutted.
19 February 1991	Glidewell files a motion to add witnesses to those in the list contained in the pre-trial order.	
25 February 1991	Jury is selected for the case, and **trial is scheduled for 26 March**.	
15 March 1991	Glidewell sends "Supplemental Responses to Defendant's Interrogatories" to defendant; this is not signed by Jerome Sumlin. Defendant moves to strike these responses.	

Date	Event	Comment
22 March 1991	Glidewell files a motion to amend the pre-trial order to add three triable issues, four expert witnesses, and six categories of documentary evidence.	
25 March 1991	Pre-trial conference; Defendant orally moves to dismiss the case; its written motion follows on 29 March 1991.	Glidewell files response on 8 April.
25 April 1991	Magistrate dismisses case, citing F.R.C.P. 41(b) and the Court's inherent power to impose sanctions.	
7 May 1991	Mr. Sumlin is notified of the dismissal; this is the first time he is made aware of problems with his counsel's handling of the case.	Mr. Sumlin immediately discharged Mr. Glidewell and retained other counsel to seek post-judgment relief.
9 May 1991	Plaintiff's new counsel moves to set aside the judgment of dismissal.	
15 July 1991	Magistrate denies this post-judgment relief motion.	
30 July 1991	Plaintiff's second counsel moves for relief from judgment of dismissal under F.R.C.P. 60(b).	
6 August 1991	Magistrate denies this post-judgment relief motion.	

Date	Event	Comment
17 December 1992	United States Court of Appeals for the Eleventh Circuit affirms	

Supreme Court, U.S.
FILED
MAY 18 1993
OFFICE OF THE CLERK

No. 92-1694

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

JEROME SUMLIN

Petitioner,

versus

SEAHAWK MANAGEMENT, INCORPORATED

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Joseph M. Allen, Jr.
Johnstone, Adams,
Bailey, Gordon & Harris
P. O. Box 1988
Mobile, Alabama 36633
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Attorney for Respondent

QUESTION PRESENTED FOR REVIEW

Whether a seaman should be exempted from the established rule that litigants are bound by the actions of their attorneys.

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STATEMENT OF THE CASE

On December 14, 1989, the Petitioner-Plaintiff filed this action in the United States District Court for the Southern District of Alabama, Southern Division. The Plaintiff, a seaman, made claims for damages under the Jones Act and the general maritime law. The district court established a cutoff date for discovery of November 26, 1990. On February 7, 1991, the district court granted a motion by the Defendant for sanctions against Plaintiff as a result of Plaintiff's failure to sufficiently answer interrogatories which were propounded on or about May 23, 1990.

Thereafter, the district court found the Plaintiff continuing to disregard orders of the court and time requirements imposed under the governing procedural rules.[1] The district court

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[1]April 25, 1991 Memorandum Opinion of William E. Cassady, Magistrate Judge of the United States District Court for the Southern District of Alabama, Southern Division.

accordingly dismissed Plaintiff's action with prejudice as such was "the only viable sanction that meets the objectives of preventing unfair prejudice to the defendant and protecting the integrity of this court." The court's findings included that the "*plaintiff* and his attorney have, in bad faith, disregarded the Federal Rules of Civil Procedure and the Orders of this Court causing delay as well as prejudice to the defendant's ability to mount a defense." (Emphasis added).

SUMMARY OF THE ARGUMENT

It is Respondent's position that the Petitioner's status as a seaman is entirely irrelevant to the district court's ruling. The dismissal of Petitioner's action in no way ignores, limits or casts doubt on a seaman's station as a ward of the admiralty.

Without question, seamen are afforded a special protection by the admiralty courts. But that protection operates to shield ignorant seamen from the sophisticated overreaching of their adversaries, i.e., vessel owners and employers, not the errors of their agents.

This case does not involve a seaman who has been duped by the misdeeds of a sophisticated adversary. To the contrary, Petitioner bases his argument on the relationship between a seaman and his advocate. Clearly, the special protection afforded seamen to which the Petitioner refers is in no manner engaged by the facts of this case.

The well-established rule is that litigants bear the risk of errors made by their attorneys. That the Petitioner is not exempted from this rule does not frustrate the protection which is concededly afforded seamen.

With respect to Petitioner's position that he has been punished for the actions of his attorney in unrelated instances, the district court's conclusion makes clear that such is not the case.

Finally, Petitioner has failed to demonstrate any of the reasons to review this case on writ of certiorari which are characterized under the governing procedural rules of this Court.

ARGUMENT

This Court has expressly established that litigants bear the risk of errors made by their attorneys. Irwin v. Veterans Administration, 498 U.S. ___, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990); Murray v. Carrier, 477 U.S. 478, 488 (1986); Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962). In Irwin, the Court declared:

> Under our system of representative litigation, "each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"

Irwin, 498 U.S. at ___, 111 S.Ct. at 456, 112 L.Ed.2d at 442 (quoting Link, supra (quoting Smith v. Ayer, 101 U.S. 320 (1990))). Petitioner seeks to be exempted from that rule, relying on the special protection afforded seamen. Petitioners' reliance is manifestly misplaced.

Respondent, of course, does not dispute that seaman are benefactors of a protecting

hand from the admiralty courts. However, the perils from which seamen are shielded are clearly not brought to bear in this case. As illustrated in the cases cited by Petitioner, the admiralty courts protect seamen from overreaching by their employers and vessel owners. Factors from which this paternalistic attitude has arisen include the "rashness and credulity" of seamen and "the particularly authoritarian relationship of ship owners and their representatives to seamen." Lampsis Navigation Ltd. v. Ortiz de Cortez, 694 F.2d 934, 936 (2d Cir. 1982). The protection, then, arises from the nature of the adversarial relationship between the stereotypically ignorant seaman and the stereotypically sophisticated vessel owner.

The classic case in which protection is afforded is where a vessel owner has extracted a release from a seaman without ensuring that

the seaman fully comprehends the ramifications of his action. In Garrett v. Moore-McCormack Co., 317 U.S. 239, 246-47 (1942), this Court refused to apply state burden of proof standards relating to the validity of a release, declaring that,

> [t]he burden is on one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights.

Garrett, 317 U.S. at 246.

The numerous other cases cited by Petitioner are merely cumulative on this point. That is to say, Petitioner cites cases which illustrate that the protection afforded to seamen is protection from overreaching by sophisticated vessel owners.

In this petition, there exists not even an allegation of overreaching. There is no release, no settlement, nor any other factor which might indicate that the Petitioner has

been duped by the Respondent. The cases cited by Petitioner are inapposite.

At issue here is not the adversarial relationship between a seaman and his employer, which due to the purported ignorance of seamen is concededly different from other litigant-employer relationships. The relationship which is the subject of this petition is the agency relationship between a seaman and his attorney. Respondent submits that this relationship is in no manner different from any other attorney-client relationship. None of the factors which compel the introduction of a special protection into the seaman-employer relationship are present in a seaman's relationship with his attorney. Petitioner's status as a "seaman", then, is not grounds on which to exempt him from the rule that all litigants must bear the risk of errors made by their attorneys.

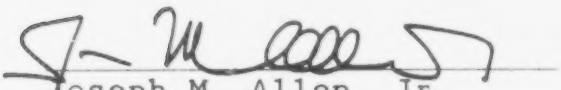
With respect to Petitioner's position that he was punished for his attorney's actions in unrelated cases, this is contradicted by the conclusion of the district court. Therein, the district court stated that "the extreme sanction of dismissal with prejudice is the appropriate sanction" because the "*plaintiff* and his attorney have, in bad faith, disregarded the Federal Rules of Civil Procedure and the Orders of this Court." (Emphasis added).

Finally, Rule 10 of the Supreme Court Rules characterizes the considerations governing the determination of whether to accept review on writ of certiorari. The petitioner has failed to demonstrate the presence of any of these considerations.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari is due to be denied.

Respectfully submitted,



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